CAUSE NO. 03-18-00153-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT
OF TEXAS AT AUSTIN

TEXAS DEPARTMENT OF TRANSPORTATION,
Appellant,

V.

ALBERT LARA, JR.
Appellee.

On Appeal from the 353rd District Court of Travis County, Texas;
Cause No. D-1-GN-16-005836; the Honorable Jan Soifer, Presiding

BRIEF OF APPELLANT TEXAS DEPARTMENT OF TRANSPORTATION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General
For Civil Litigation

RANDALL K. HILL
Assistant Attorney General
Chief, Transportation Division

AMY KOVAR OWENS
State Bar No. 24053309
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 463-2004
Facsimile: (512) 936-0888
amy.owens@oag.texas.gov

ATTORNEYS FOR APPELLANT TEXAS DEPARTMENT OF TRANSPORTATION

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Parties

Texas Department of Transportation	Defendant/Appellant
Albert Lara, Jr.	Plaintiff/Appellee

Counsel

Amy Kovar Owens Assistant Attorney General Transportation Division P. O. Box 12548 Austin, Texas 78711-2548	Appellate Counsel for Texas Department of Transportation
Amy Owens Samantha Diaz Taylor Graham Assistant Attorneys General Transportation Division	Trial Counsel for Texas Department of Transportation
Joel Shields Scanes & Routh, LLP 7901 Fish Pond Rd Stw 200 Waco, Texas 76710-1013	Trial and Appellate Counsel for Albert Lara, Jr.

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STATEMENT OF THE CASE

Nature of the Case:	Plaintiff, Albert Lara, Jr., brought suit against the Texas Department of Transportation ("TxDOT") for disability discriminaton, failure to accommodate, and retaliation under Chapter 21 of the Texas Labor Code.
Trial Court:	The Honorable Jan Soifer, sitting as Presiding Judge of the 353rd District Court of Travis County, Texas.
Trial Court Disposition:	The trial court denied TxDOT's plea to the jurisdiction.

ISSUES PRESENTED

I. Whether the trial court erred in denying TxDOT's plea to the jurisdiction on failure to accommodate claims when is is undisputed that Lara could not perform work of any kind, did not request an accommodation, and no reasonable accommodation was available.

II. Whether the trial court erred in denying TxDOT's plea to the jurisdiction on disability discrimination claims since it is undisputed that Lara was unable to perform essential job duties as of the date of separation and Lara was not separated because of his disability.

III. Whether the trial court erred in denying TxDOT's plea to the jurisdiction on retaliation claims when Lara did not participate in a protected activity and did not establish a causal link.

TO THE HONORABLE COURT OF APPEALS:

The Texas Department of Transportation ("TxDOT") submits this Brief requesting that the trial court's decision to deny TxDOT's plea to the jurisdiction be reversed and the claims of Plaintiff, Albert Lara, Jr. ("Lara") be dismissed with prejudice.

STATEMENT OF FACTS

This is an employment case wherein Lara filed suit against TxDOT under Chapter 21 of the Texas Labor Code alleging disability discrimination, failure to accommodate, and retaliation.

A. Procedural background.

On September 16, 2015, Lara was administratively separated from TxDOT. CR 114. On or about March 4, 2016, Lara filed a complaint with the Texas Workforce Commission ("TWC") and the Equal Employment Opportunity Commission ("EEOC") against TxDOT based on disability discrimination and retaliation. CR 40. On November 28, 2016, the TWC issued a Notice of Right to File a Civil Action. CR 42. On December 1, 2016, Lara filed a lawsuit in the 353rd Judicial District Court of Travis County, Texas, alleging that TxDOT violated his rights under the Texas Labor Code on the basis of disability and unlawful retaliation. CR 3-7. TxDOT filed a plea to the jurisdiction and motion for summary judgment

to dismiss all claims, which was denied on February 21, 2018. App. A.[1] On March 7, 2018, TxDOT filed its Notice of Interlocutory Appeal. CR 566.

B. Factual background.

Lara served as an at-will employee of TxDOT, an agency of the State, from June 1, 1994, until his administrative separation on September 16, 2015. CR 114. At the time of his separation, Lara was a General Engineering Technician I, commonly referred to as an inspector, in the Milam County Maintenance Section in the TxDOT Bryan District. CR 138. He was the Maintenance Section's only contract inspector and he oversaw various maintenance contracts within Milam County including litter removal, guardrail damage, spot base repair, picnic area, and mowing contracts. His position required daily coordination with various contractors, as well as inspecting the work to make sure it conformed to contract specifications with proper safety measures being followed. CR 58-62, 138-39. At the time of his separation on September 16, 2015, Lara had not reported to work since April 22, 2015. CR 53-54.

1. Lara's leave and TxDOT's interactive process

Beginning on April 22, 2015, Lara called into work with stomach issues and reported to TxDOT that he was in the hospitial. CR 123. On April 28, 2015, Lara's

[1] The Order was included in the Designation of Clerk Record Items (CR 569), but was not included in the filed Clerk's Record. A second request for the Order was made April 12, 2018.

direct supervisor, Bradley Powell, Milam County Maintenance Section Supervisor, contacted TxDOT Human Resources ("HR") in the Bryan District to inform HR that Lara had been absent from work since April 23, 2015, for a reason that could be a serious health condition. CR 52-53. TxDOT HR assessed Lara's eligibility for Family Medical Leave ("FML"), verified his leave balances, and looked at the possible need for extended sick leave or sick leave pool ("ESL/SLP"). *Id.* On April 29, 2015, TxDOT sent paperwork to Lara with forms and information pertaining to his eligibility and possible qualifications of FML and ESL/SLP. CR 52-53, 78-96. Lara had very little leave available as of April 23, 2015, and his personal sick leave, vacation, and comp time balances were exhausted on May 5, 2015. CR 52-53. TxDOT determined Lara was eligible for FML, and placed Lara on Leave Without Pay Employee Sick ("LWPES") and he was considered to be on Leave Without Pay ("LWOP") for payroll purposes. *Id.*

On May 13, 2015, TxDOT HR received notification from Lara's physician that indicated he had been hospitalized from April 27, 2015 through May 12, 2015 and the doctor's best estimate for Lara to return to work was June 23, 2015. CR 144-45, 149-51. At that time, the doctor did not indicate that Lara's condition was catastrophic or that it would cause him to miss work for more than twelve continuous weeks. Therefore, according to TxDOT policy, Lara did not qualify for additional

paid leave from the sick leave pool. *Id.* Lara continued on LWOP status. CR 52-53.

On June 15, 2015, TxDOT HR received additional paperwork from Lara's physician stating that he would not be returning to work June 23, 2015 as previously indicated. The paperwork indicated that Lara had surgery May 7, 2015 and indicated a probable duration of his condition of six months from the date of surgery. CR 53-54, 145, 153-59. Based on the information provided on the June 15, 2015 ESL/SLP request forms, Lara now qualified for paid sick leave pool and was granted 413.25 hours to cover him from May 5, 2015 (which was the date his own personal balance of leave accrual exhausted) until July 20, 2015 (since July 21, 2015 was the date the doctor estimated that he could return to work). CR 145.

On July 10, 2015, TxDOT sent a letter to Lara informing him that his FML would expire on July 15, 2015, after which he would no longer have job protection. CR 98-112. The letter also explained that he would exhaust all paid leave available to him on July 20, 2015, and was provided additional paperwork for requesting paid leave through SLP. *Id.* In the letter, TxDOT also informed Lara that he might be eligible for LWOP but "*you must request to be placed on LWOP*." CR 98-109 (emphasis added). TxDOT attached a copy of the LWOP procedures to the letter which spelled out the procedure to obtain LWOP, including a requirement that the employee write a memo to his supervisor to request LWOP. *Id*. It is undisputed that

Lara failed to follow proper LWOP procedure – he never sent the required memo to his supervisor and never called his supervisor or the District Engineer regarding LWOP. CR 127, 145, 141.

On July 15, 2015, TxDOT HR received additional SLP request paperwork from Lara's doctor indicating that Lara would not be returning to work July 21, 2015, that he was unable to perform his job duties, and that the new best estimate return date was now for four months later – October 21, 2015. CR 161-67. This documentation also indicated a period of incapacity through November 2015 and still indicated a second ostomy take down surgery. CR 166-67. This additional documentation for ESL/SLP qualified Lara for additional paid leave from the SLP and he was granted an additional 306.75 hours to cover him from July 21, 2015 through September 16, 2015 (which is the date the final SLP awarded balance would exhaust the maximum 720 hours of SLP TxDOT could grant according to law and policy). CR 145, 75. *See also* Tex. Gov't Code §661.006 (providing a 90-day or 720-hour limit on SLP hours).

2. TxDOT's decision for separation

On September 1, 2015, four months after Lara left his job indefinitely, TxDOT Bryan District Engineer, Lance Simmons, met with TxDOT HR specialist, Elizabeth Holick, to discuss Lara's future status with TxDOT. CR 169-70. As the District Engineer, Simmons is the final decision maker for employment separations. *Id.*

Simmons was aware that Lara's FML job protection expired a month and a half earlier, that his maximum 720 hours paid sick leave balance would exhaust September 16, 2015, and that Lara had not requested any accommodations. *Id*. and CR 145-46. Lara was not eligible for FML for the fiscal year of 2016 and Simmons was aware that Lara would not be able to return to work of any kind until possibly October 21, 2015. *Id.* Simmons also had previous discussions with Lara's supervisor and was aware that Lara was the only contract inspector for the Milam County Office and was aware of the strain that Lara's absence was placing on the Milam County office. CR 169-70. During Lara's five- month leave period, a general maintenance technican was covering the majority of Lara's duties, therefore there was additional strain on the other maintenance technicians to cover the extra work, and work had to be cancelled or rescheduled due to lack of personnel. CR 138-42. Simmons was also aware that Lara's doctor continued to change and/or postpone Lara's return date and that Lara needed a second surgery within two weeks of the latest potential return date, leaving Lara's return date open to futher indefinite postponement. CR 169-70. Considering Lara's condition and excessive postponements, Simmons made the determination that in order to meet the business needs of the Bryan District, it was necessary to hire a full-time employee to perform Lara's duties and that Lara would be administratively separated after the 720-hour maximum SLP expired on September 16, 2015. *Id.* Simmons was unable to fill

Milam County's only inspector position by hiring an additional employee since the Bryan District has a limited allocation of positions and Lara's position was considered occupied, despite his five month absence. CR 170.

On September 9, 2015, TxDOT sent a letter to Lara informing him of this decision. CR 114. The letter stated that Lara's FML expired July 15, 2015 and that the last documentation provided to TxDOT indicated that Lara would not be able to return to work of any kind until October 21, 2015 at the earliest. *Id.* The letter stated that in order to meet business needs of the district, it was necessary to hire a full-time employee to perform Lara's duties and the letter encouraged Lara to re-apply for any vacant position once he had medical clearance. *Id.* Lara's position was filled on October 5, 2015. CR 142. Lara has not re-applied to work for TxDOT and did not work again anywhere until August 2016. CR 122, 126.

SUMMARY OF THE ARGUMENT

When it is undisputed that a plaintiff cannot perform work of any kind as of the date of separation, and/or when an employer notifies the employee of specific procedures to request Leave Without Pay and the employee fails to request such, a prima facie case of failure to accommodate cannot be established and the court has no jurisdiction. Furthermore, when an employer provides the maximum amount of leave available to an employee per statute and policy, and when an employee's potential return to work date continues to be postponed with an unscheduled surgery

pending, such leave should be considered indefinite and any additional leave would not be a reasonable accommodation. Thus, Lara's claims of failure to accommodate should be dimissed.

Furthermore, when an employee is not able to perform essential duties for his job as of the date of the adverse employment action and there is no evidence that plaintiff was separated solely because of his disability, a prima facie case of disability discrimination cannot be established. Therefore, Lara's claims of disability discrimination should be dismissed.

Finally, when it is undisputed that plaintiff did not engage in a protected activity under Texas law and/or if the court broadly reads an alleged "request" for six months off as a protected activity but the plaintiff fails to establish a causal link, a prima facie case of retaliation cannot be established. Therefore, Lara's claims of retaliation should be dismissed.

ARGUMENT

"In Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). TxDOT is an agency of the State of Texas and asserts that sovereign immunity bars all of Lara's claims. The State has not consented to suit for any of Lara's claims. Sovereign immunity from suit defeats a

trial court's jurisdiction and is properly raised in a plea to the jurisdiction. *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638-39 (Tex. 1999). A trial "court deciding a plea to the jurisdiction is not required to look solely to the pleadings, but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).

According to the Texas Supreme Court in *Miranda*, "if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do." *Miranda*, 133 S.W.3d at 227. Where the jurisdictional challenge implicates the merits of Lara's cause of action, the court must review the relevant evidence to determine if a fact issue exists. *Id.* If the relevant evidence is undisputed or fails to raise a material fact question on the jurisdictional issue, the court must rule on the plea to the jurisdiction as a matter of law. *Id.* Subject matter jurisdiction may also be raised by a motion for summary judgment. *Bland*, 34 S.W.3d at 554. An interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle, such as a motion for summary judgment. *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004).

The Texas Supreme Court has stated that unless a plaintiff making an employment-discrimination claim under the Texas Commission on Human Rights Act ("TCHRA") can meet his burden of demonstrating a prima facie case on his claims, there is no waiver of sovereign immunity and the trial court has no jurisdiction. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012). Since Lara cannot meet his burden of demonstrating a prima facie case on his failure to accommodate, disability discrimination, or retaliation claims, there is no waiver of sovereign immunity and all claims should be dismissed.

I. The trial court erred in denying TxDOT's plea to the jurisdiction on failure to accommodate claims since it is undisputed that Lara could not perform work of any kind, did not request an accommodation, and no reasonable accommodation was available.

To establish a prima facie case of failure to accommodate a disability, plaintiff must show that (1) he is a qualified individual with a disability, (2) the disability and its consequential limitiations were known by the employer, and (3) the employer failed to make reasonable accommodations for such known limitiations.[2] *Tex. Parks & Wildlife Dep't v. Gallacher*, No. 03-14-00079-CV, 2015 WL 1026473, at *4 (Tex.

[2] Some courts, including the Third Court in some opinions, have applied a four prong-test for failure to accommodate: 1) an employee has a disability; 2) an employer had notice of his disability; 3) with "reasonable accommodations" he could perform the "essential functions" of his position; and 4) the employer refused to make such accommodations. *See* *Davis v. City of Grapevine*, 188 S.W.3d 748, 758 (Tex. App.—Fort Worth 2006, pet. denied) and *Adams v. Artco-Bell Corp.*, No. 03-08-00690-CV, 2010 WL 1507796, at *2 (Tex. App.—Austin April 14, 2010, no pet.) (mem. op.). Discussions of qualifications to perform essential functions, duty under the interactive process, and "reasonableness" are equally covered under the three-prong test.

App.—Austin Mar. 4, 2015, no pet.) (mem. op.) (citing *Smith v. City of Austin*, No. 03-12-00295-CV, 2014 WL 4966292, at *1 (Tex. App.—Austin Sept. 30, 2014, no pet.) (mem. op.) and *Feist v. Louisiana, Dep't of Justice, Office of the Attorney Gen.*, 730 F.3d 450, 452 (5th Cir. 2013)); *see also* Tex. Lab. Code § 21.128. The plaintiff is required to demonstrate, as part of his prima facie case, that an accommodation of his disability exists and that such accommodation is reasonable. *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 683 (5th Cir. 1996).

In his petition, Lara claims that "Lara's physician communicated to TxDOT through medical-leave paperwork" the anticipated duration of his condition was "*approximately* six months post-surgery, i.e., November 7, 2015" and that later medical information indicated an anticipated return to work date of "*approximately* October 21, 2015." CR 4 (emphasis added). The petition alleges that TxDOT failed to engage in the interactive process and failed to provide a reasonable accommodation to Lara of 1) extended medical leave, 2) LWOP, and 3) a transfer to a vacant position. CR 5. In Lara's response to TxDOT's plea to the jurisdiction, Lara also implies that TxDOT failed to provide light duty. CR 186.

It is undisputed that TxDOT provided the maximum amount of sick leave pool hours per statute and policy available to Lara and that Lara was out on continuous leave for nearly five months, therefore, the failure to provide extended medical leave claim fails. It is undisputed that TxDOT had specific procedures to request LWOP,

that TxDOT provided those procedures as an option to Lara, and that Lara failed to request LWOP, therefore, the failure to provide LWOP claim fails. It is also undisputed that Lara's doctors did not at any point clear Lara to return to work of any kind, therefore, the failure to provide a transfer or light duty claim also fails and shows that Lara was not qualified.

A. Lara was not qualified since he was unable to perform work of any kind.

It is undisputed that Lara's physican certified that Lara was not able to perform essential job functions since April 27, 2015, that he was unable to perform work of any kind, and the earliest possible return to work date was October 21, 2015. CR 162. On June 15, 2015, and July 15, 2015, the doctor indicated that Lara's duration of condition would last six months from the date of his surgery (or November 7, 2015). CR 157, 165. On June 15, 2015, Lara's doctor indicated that he would need a colostomy takedown after wounds healed, approximately six months after his May 7, 2015 surgery (or approximately November 7, 2015). CR 158-59. His latest paperwork indicated that Lara would be incapacitated through November 2015 and would require an ostomy takedown after wounds were healed. CR 165-66. During the five months that Lara had been out, his return to work date was pushed back three times. CR 150, 154, 162. Lara's FML expired on July 15, 2015 and he did not qualify for FML for the 2016 fiscal year. CR 145.

A plaintiff can show the "qualificaton" element in one of two ways: 1) by proving that he can perform all essential job functions with or without modifications or accommodations, or 2) that some reasonable accommodation by the employer would enable him to perform the job. *Turco v. Hoechst Celanese Corp.*, 101 F. 3d 1090, 1093 (5th Cir. 1996); *Austin State Hosp. v. Kitchen*, 903 S.W. 2d 83, 91 (Tex. App.—Austin 1995, no writ). Paperwork provided by Lara from his physician clearly indicated that he was unable to perform work of any kind. CR 162-67. Employers are liable only for discrimination that occurs "because of or on the basis of a physical or mental condition that *does not* impair an individual's ability to reasonably perform a job." Tex. Lab. Code § 21.105 (emphasis added). Thus, whether the TCHRA applies can turn on whether an individual with a particular condition has the ability to reasonably perform a job. *Gallacher*, 2015 WL 1026473, at *4. Since it is undisputed that Lara had not attended work for five months, could not attend for at least another five weeks with a major follow up surgery to be scheduled, Lara was not qualified as of the date of his separation September 16, 2015.

Lara argues that he was "qualified" by citing his 21 years of service with TxDOT; however, the relevant inquiry is whether he was qualified at the time of his termination. *See Amsel v. Tex. Water Dev. Bd.*, 464 F. App'x 395, 400 (5th Cir. 2012); *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 418 (5th Cir.

2017). It is uncontroverted that Lara was unable to perform essential functions of his job at the time of his separation September 16, 2015. Regular attendance is a necessary qualification for Lara's job as a contract inspector to oversee and coordinate the various contracts in Milam County. CR 138-42. *See* Carmona v. Sw. Airlines Co., 604 F.3d 848, 859 (5th Cir. 2010); Smith v. Lattimore Materials Co., 287 F. Supp. 2d 667, 672 (E.D. Tex.), *aff'd*, 77 F.App'x 729 (5th Cir. 2003) ("Reporting on time and regular attendance is an essential function of any job.").

Granting an additional five weeks of leave, with an anticipated follow up surgery and recovery time after FML expired and 90 days of SLP was exhausted was not a reasonable accommodation. A reasonable accommodation is by its terms that which *presently or in the immediate future* enables the employee to perform the essential functions of the job in question. Moss, 851 F.3d at 419; *see also* Dep't of Aging & Disability Servs. v. Comer, 2018 WL 521627, at *7 (Tex. App.—San Antonio Jan. 24, 2018, no pet.) (where the court reversed the denial of a plea and dismissed all claims after finding plaintiff was not qualified and no reasonable accommodation was possible). "[A]n accommodation that would result in other employees having to work harder or longer is not required under the ADA." Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996); *see also* Barber v. Nabors Drilling U.S.A., Inc., 130 F. 3d 702, 709 (5th Cir. 1997) ("We cannot say that [the plantiff] can perform the essential functions of the job with reasonable

accommodation, if the only successful accommodation is for [the plaintiff] not to perform those essential functions.").

Many courts have held that a plaintiff unable to perform essential functions at the time of separation is not qualified. *See generally* *Gallacher*, 2015 WL 1026473, at *4-6; *Tex. Dep't of State Health Servs. v. Rockwood*, 468 S.W.3d 147, 156 (Tex. App.—San Antonio 2015, no pet.) (evidence conclusively negated plaintiff was qualified at the time of her termination when she had surgery in December and was not released to work until March 15 and plaintiff testified she wsa not able to work before March 15); *Comer*, 2018 WL 521627, at *7; *Cortez v. Raytheon*, 663 F. Supp. 2d 514, 521 (N.D.Tex. 2009) (holding plaintiff unable to attend work is not a "qualified individual with a disability" under ADA); *Moss*, 851 F.3d at 417 (where plaintiff exhausted all FML leave and doctor could not release plaintiff to work for another month, he was medically incapable of performing duties at the time of termination and not qualified). Since it is undisputed Lara was not medically cleared to perform work of any kind on September 16, 2015, and was incapacited through November with a follow up surgery estimated November 7, 2015, Lara was not a qualified individual with a disability under ADA.

B. Lara did not request a reasonable accommodation.

It is the employee's request for accommodation that triggers the employer's obligation to institute one.

(N.D. Tex. 1996), *aff'd*, 114 F.3d 1182 (5th Cir. 1997) ("the employee cannot expect the employer to read [his] mind and know [he] secretly wanted a particular accommodation and sue the employer for not providing it."). "Accordingly, no liability arises under the ADA when an employee fails to request a reasonable accommodation." *Amato v. St. Luke's Episcopal Hosp.*, 987 F.Supp. 523, 532-33 (S.D.Tex. 1997); *see also Taylor v. Principal Fin. Grp, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996).

It is undisputed that Lara did not personally request any accommodations and did not provide any documentation that indicated that he requested modified duties, light duties, or transfers. CR 145, 170. According to Lara, the only accommodation that he requested was him telling non-supervisors and non-HR personnel that he wanted to keep his job. CR 126-27. If an employee's mere statement that he wants to keep his job and/or the employer's assumption that an employee would like to keep his job rises to the level of a request for accommodation, every employee terminated in the State of Texas would meet this prong, rendering the requirement that a request be made meaningless and/or imposing a burden of an employer forcing accommodations on an employee.

Lara complains that TxDOT did not give him extended leave as an accommodation. It is undisputed that on June 16, 2015 TxDOT granted 413.25 hours of paid leave from SLP, and then again on July 29, 2015, TxDOT granted an

additional 306.75 SLP hours, which was the maximum allowed by law. *See* 43 Tex. Admin. Code § 4.56; Tex. Gov't Code §§ 661.005, .006. TxDOT is not required by law to grant sick leave pool hours. *Id.* In fact, TxDOT could have separated Lara when his FMLA leave expired on July 15, 2015; however, as a reasonable accommodation with the SLP request on file, TxDOT allowed the maximum SLP hours to expire through September 16, 2015. The administrative code states: "[t]he purpose of the sick leave pool program is to provide additional sick leave for an employee when the employee…has a catastrophic illness or injury which causes the employee to exhaust all paid leave…". 43 Tex. Admin. Code § 4.50. Lara's doctor never certified that he had a catastrophic condition. CR 150, 154, 162, 551-55. The maximum number of hours granted is 720 hours but the pool administrator shall determine the amount of time an employee may withdraw from the pool. *See* 43 Tex. Admin. Code § 4.56; Tex. Gov't Code §§ 661.005, .006. In this instance, since Lara was not able to work for 12 continuous weeks, TxDOT granted him the maximum sick leave pool hours. CR 144-45. TxDOT was not required to give any extended sick leave and certainly not required to give the maximum 720 hours, but it did. Bryan District Engineer Simmons is not aware of any employee in the District ever receiving additional leave after the FML and 720 hour SLP have expired. CR 170. Since TxDOT granted the maximum amount of sick leave pool, Lara's claim

of failure to provide extended leave fails. This was a reasonable accommodation that TxDOT provided to the extent allowed by law.

Lara also claims TxDOT failed to accommodate by providing a transfer, job modification, and/or providing light duty. It is undisputed that Lara's physicians never cleared him for work of any kind during the five months spanning his April 23, 2015 departure through his September 16, 2015 separation. His physician indicated that Lara could not do work of any kind. CR 162. Lara was TxDOT Milam County's only contract inspector and was in charge of coordinating with contractors and making sure contracts were being performed according to specifications, which included visiting sites, testing materials, setting up traffic controls, operating dump trucks, etc. CR 138-41. During his five-month leave, a general technician was performing the majority of Lara's duties which prevented the technician from performing his own essential duties. *Id.*

"As a matter of law, it is an unreasonable accommodation for an employer to have to exempt the employee from performance of an essential function of the job." *Jones v. Kerrville State Hosp.*, 142 F.3d 263, 265 (5th Cir. 1998). "The law does not require an employer to transfer from the disabled employee any of the essential functions of his job." *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 709 (5th Cir. 1997). "An employer is not required to create 'light duy' jobs to accommodate."

was no indication that Lara was released to perform work of any kind, and since there is no duty for TxDOT to create a light duty positition for Lara, Lara's claims for failure to accommodate based on lack of transfer, job modification, and/or light duty should be dismissed. *See generally* *Smith v. Mary Kay, Inc.*, 1999 WL 706435, at *4-5 (Tex. App.—Dallas Sept. 13, 1999, no pet.) (not designated for publication) (finding plaintiff was unable to perform essential functions and evidence conclusively established plaintiff was unqualified for other positions based on medical restrictions).

It is undisputed that Lara did not request an accommodation of leave without pay. CR 127. Instead he relies on the paperwork turned in by his physician for extended sick leave pool hours that lists an estimated return date of October 21, 2015 and a November follow up surgery, as his request for leave without pay. *Id.* TxDOT gave him paperwork on July 10, 2015, explaining to him that he might be eligible for LWOP but in order to be placed on LWOP status he must request it in a memo and that if he was approved for LWOP he would be responsible for his portion of insurance premiums and also the portion that is normally paid for by the State. CR 98. "[T]he plantiff has the burden to request reasonable accommodations; she cannot expect the defendant to have 'extra-sensory perception' about accommodations that would allow her to perform the job's essential functions." *LeBlanc v. Lamar State Coll.*, 232 S.W.3d 294, 300 (Tex. App.—Beaumont 2007,

no pet.) (citing *Burch v. City of Nacogdoches*, 174 F.3d 615, 619 (5th Cir. 1999); *Burch v. Coca-Cola, Co.*, 119 F.3d 305, 319 (5th Cir. 1997)).

A doctor's note with a potential return to work date is not a request for LWOP as per TxDOT policy. CR 98-112. It is not open, obvious, or apparent that Lara wanted LWOP, especially in light of the fact that TxDOT provided instructions on how to request LWOP in writing on July 10, 2015. Lara failed to follow up with such procedures in the following two months. It is undisputed that he never called his supervisor, the Bryan District Engineer, or HR to request LWOP—even after he received the letter on September 9, 2015 indicating that he would be separated on September 16, 2015. CR 127, 141, 145, 170. According to deposition testimony, Lara even spoke to his supervisor, Brad Powell, on September 14 and 15, 2015, about pay stubs and still never requested or inquired about LWOP. CR 131, 136. Lara cannot lie in wait and expect TxDOT to automatically place him on LWOP when TxDOT provided the instruction and offered it as an option, and Lara simply failed to follow procedure and request it. *Morton*, 922 F. Supp. at 1180.

C. Even if a doctor's note listing a potential return date could be construed as a request for LWOP, it was not reasonable as a matter of law since it was indefinite in nature.

A doctor's note indicating a potential return date should not be considered an accommodation for leave under the ADA. *See Hester v. Williamson Cty, Tex.*, No. A-12-CV-190-LY, 2013 WL 4482918, at *7 (W.D. Tex. Aug. 21, 2013). It is the

employee's responsibility to inform his employer that an accommodation is needed. *EEOC v. Chevron Phillips Chem. Co., L.P.*, 570 F.3d 606, 621 (5th Cir. 2009). TxDOT gave specific instructions on how to request leave without pay. CR 98-109. Leave without pay comes with the financial responsibility of covering insurance premiums covered by the State. Absent the employee following the stated policy to request leave without pay, it would be unreasonable and presumptuous for an employer to assume the employee is able to take on this financial responsibility. And it would be unreasonable to presume a doctor's note stating a leave period for SLP hours was a formal request for leave without pay. *See Taylor*, 93 F.3d at 165 ("a disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation."). As in the *Hester* case, the plaintiff's doctor does not know the status of the employee's leave with his employer and is simply providing the employer with information regarding medical needs. *Hester*, 2013 WL 4482918, at *7. When the responsibility for the breakdown in the interactive process is traceable to the employee, the employer has not violated the ADA. *Hagood v. Cty. of El Paso*, 408 S.W.3d 515, 525 (Tex. App.—El Paso, 2013, no pet.) (citing *Loulseged v. Akzo Nobel, Inc.*, 178 F.3d 731, 736 (5th Cir. 1999)).

Even if a court could construe the doctor's note as a request for leave without pay, the indefinite recovery time is not a reasonable accommodation. The plaintiff

is required to demonstrate, as part of his prima facie case, that an accommodation of his disability exists and that such accommodation is reasonable. *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 683 (5th Cir. 1996); *see also Bennett v. Calabrian Chems. Corp.*, 324 F. Supp. 2d 815, 836 (E.D. Tex. 2004). Lara has not carried his burden that leave without pay for a minimum of five weeks and indefinite additional leave for a second follow up surgery on top of the five months leave TxDOT already provided would be a reasonable accommodation. It is tantamount to indefinite leave. The Fifth Circuit considers requests for disability leave without a specific end date to be requests for indefinite leave; such a request is not reasonable. *Silva v. City of Hidalgo*, 575 F. App'x 419, 423 (5th Cir. 2014). The Fifth Circuit has a very limited view of additional leave as a reasonable accommodation in that an "unbudging framework" of terminating employees if they were unable to return to work following the expiration of FMLA leave could potentially violate the employer's ADA duties. *Id.* However, that is not what happened in this case. Lara was administratively separated more than 8 weeks after his FMLA leave expired after TxDOT gave LWOP and 720 hours of sick leave pool, and after TxDOT provided paperwork instructing Lara how to request leave without pay. TxDOT management met and discussed doctor's notes, the estimated return date that had been extended three times, time already taken, the fact that Lara had not submitted a written memo seeking leave without pay, and the business needs and undue hardship the Milam

County office experienced during Lara's five month absence, as well as the follow up surgery and the indefinite leave required for recovery. CR 55, 145-46, 170.

The Fifth Circuit acknowledged that, although taking limited leave of a definite duration may be a reasonable accommodation, an employer is not expected to wait indefinitely for all conditions to be corrected. *See* *Moss*, 851 F.3d at 419; *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 760 (5th Cir. 1996) ("reasonable accommodation does not require an employer to wait indefinitely for the employee's medical conditions to be corrected."). A reasonable accommodation is by its terms that which *presently or in the immediate future* enables the employee to perform the essential functions of the job in question. *Moss*, 851 F.3d at 419. The Fifth Circuit has held when an employee was unavailable for work recuperating from ankle surgery, he was not a qualified individual with a disability under the ADA. *Rogers*, 87 F.3d at 759. Several U.S. District Courts have also held that in many circumstances, unpaid leave is not a reasonable accommodation. *See* *Molina v. DSI Renal, Inc.*, 840 F. Supp. 2d 984, 1002 (W.D.Tex. 2012) (holding additional medical leave is not a reasonable accommodation when plaintiff had not yet scheduled a date for a follow up surgery); *Hester* 2013 WL 4482918, at *7-8 (additional eight weeks of leave after FML expired to recover from foot surgery not reasonable, not obvious that employer should understand a faxed note from the doctor as a request for

accommodation); *Salem v. Houston Methodist Hosp.*, 2015 WL 6618471, at *7-8 (S.D.Tex. 2015).

Here, the uncontroverted evidence is that Lara was unable to return to work on the date of his termination, September 16, 2015, and no set return date after that point. Lara's second surgery was to take place on approximately November 7, 2015, and Lara would need an unknown amount of time after that point to recover. *See* CR 557.[3] The Fifth Circuit has made it clear that taking indefinite leave, or taking leave without a specified date to return is not a reasonable accommodation. *Moss*, 851 F.3d at 419. Furthermore, the evidence TxDOT presented that Lara was the only contract inspector in Milam County and another employee was having to cover his extensive duties during the five-month period also lends to the unreasonableness of additional leave. *See* Tex. Labor Code § 21.128. ("It is an unlawful employment practice…to fail or refuse to make a reasonable workplace accommodation…unless the respondent demonstrates that the accommodation would impose an undue hardship on the operation of the business of the respondent".

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[3]" Q: And did your doctor ever tell you how long you would have to be in the hospital related to that removal?
A: Not particularly.
Q: Did they ever tell you what the healing or recovery time would be from that surgery?
A: It depended on how they did the surgery.
Q: What's the shortest amount of time that they told you or did they give you a range?
A: They never gave me a range."

II. The trial court erred in denying TxDOT's plea to the jurisdiction on disability discrimination claims since it is undisputed that Lara was unable to perform essential job duties as of the date of separation and Lara was not separated because of his disability.

To establish a prima facie case of disability discrimination under TCHRA, Lara must show that he (1) has a disability, (2) is qualified for his employment position; and (3) suffered an adverse employment decision solely because of his disability. *Davis v. City of Grapevine*, 188 S.W.3d 748, 757 (Tex. App.—Fort Worth 2006, pet. denied). Because Lara failed to establish that he was qualified for his position or that he was separated solely because of his disability, all disability discrimination claims should be dismissed.

A. Lara was not qualified since he could not perform essential duties at the time of his seperation.

As discussed above, the relevant inquiry is whether the employee is qualified or able to perform essential duties for his job as of the date of the adverse employment action. *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413 (5th Cir. 2017). Here, Lara does not dispute that he was unable to perform essential duties or report to work on the date he was terminated, September 16, 2015, therefore evidence conclusively negates any allegations that Lara was qualified to perform duties. *Rockwood*, 468 S.W.3d 147, 156.

B. Lara cannot show that he was terminated solely because of his disability.

No evidence shows that Lara was separated from TxDOT because of his disability. The legitimate, non-discriminatory reasons for the separation were listed in the separation letter—FML expired July 15, 2015 and he no longer had job protection, Lara could not work until possibly October 21, 2015, and in order to meet business needs of the district it was necessary to hire a full-time employee to perform Lara's duties. CR 114. In fact, when asked in deposition why he thought he was administratively separated, Lara answered: "Because I—my—I couldn't return the possible October 21st, and they were—it stated in—I no longer had job protection on July 15th." CR 123. Lara goes on to state that he has no idea why TxDOT terminated him. *Id*. Lara's claims of disability discrimination should be dismissed since there is no evidence that he was separated solely because of his disability.

III. The trial court erred in denying TxDOT's plea to the jurisdiction on retaliation claims.

To establish a prima facie case of retaliation under the TCHRA, an employee must show that he: 1) engaged in a protected activity, 2) an adverse employment action occurred, and 3) a causal link existed between the protected activity and the adverse action. *Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 487 (5th Cir. 2004). The employee must establish that, absent his protected activity, the adverse employment action would not have occurred when it did. *Gumpert v. ABF Freight*

Sys., Inc., 293 S.W.3d 256, 262 (Tex. App.—Dallas 2009, pet. denied). Lara cannot establish a prima facie case because he cannot show that he was engaged in a protected activity. Even assuming a request for six months and/or indefinite leave was a protected activity, he cannot establish a causal link.

A. Lara did not participate in a protected activity under Texas Law.

Under the Texas Labor Code, an employer commits unlawful employment practice if the employer retaliates or discriminates against a person who: 1) opposes a discriminatory practice; 2) makes or files a charge; 3) files a complaint; or 4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing. Tex. Lab. Code Ann. § 21.055. Lara in this case admits he has not participated in any of these protected activities. CR 125-26.

To the extent that Lara claims the protected activity was requesting six months of leave as an accommodation and/or unpaid leave, neither are considered protected activities under the Texas Labor Code. Furthermore, Lara never made a request for LWOP. CR 127, 145.

B. Lara did not establish a sufficient causal link.

Circumstantial evidence sufficient to show a causal link between an adverse employment decision and the protected activity may include: 1) the employer's failure to follow its usual policy and procedure; 2) discriminatory treatment in comparison to similarly situated employees; 3) knowledge of the discrimination

charge or suit by those making the adverse employment action; 4) evidence that the stated reasons for the adverse employment decision were false; and 5) the temporal proximity between the employee's conduct and discharge. *Crutcher v. Dall. Indep. Sch. Dist.*, 410 S.W.3d 487, 494 (Tex. App.—Dallas 2013, no pet.). It is uncontroverted that no employee in the Bryan District has ever received LWOP after FML and SLP have expired. CR. 54, 170. Lara has not offered any comparators nor has he provided evidence that the stated reason for Lara's separation was false or anything other than a business decision to fill the position.

Even if this court broadly reads that a request for accommodation or LWOP for six months could be a protected activity under the Texas statutue, the earliest date Lara "requested" such accommodation was April 2015, more than four months before his administrative separation.[4] CR 150, 157. After Lara's doctor faxed in the SLP paperwork in May 2015 indicating a six month recovery, TxDOT granted LWOP (after Lara's leave expired May 5, 2015). After Lara's doctor faxed SLP paperwork on June 16, 2015, TxDOT granted 413.25 hours of paid leave from SLP, and then again when Lara's doctor faxed SLP paperwork July 15, 2015, TxDOT

[4] Lara's petition states when Lara took leave in April 2015, "Lara's physician communicated to TxDOT through medical-leave paperwork that the anticipated duration of his condition and his absence from work would be approximately six months post-surgery, i.e. approximately November 7, 2015."

granted an additional 306.75 SLP hours, which was the maximum allowed by law. TxDOT is not required by law to grant sick leave pool hours.

When "mere temporal proximity" between an employer's knowledge of protected activity and an adverse employment action is accepted as sufficient evidence of causation to establish prima facie case of retaliation, the temporal proximity must be "very close." *Amsel v. Tex. Water Dev. Bd.*, 464 Fed. Appx. 395, 402 (5th Cir. 2012) (citing *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)). The relevant time frame for what is considered "very close" varies, but the Fifth Circuit has concluded that a gap of about two months and one week between the protected activity and the adverse action was insufficient by itself to infer a causal link. *See Gallacher*, 2015 WL 106473, at *6-7; *Amsel v. Tex. Water Dev. Bd.*, 464 Fed. Appx. 395, 401-02 (5th Cir. 2012). Courts have also ruled that retaliatory animus is not supported when an employer awards additional hours of sick-pool leave and emergency leave to its employees after FMLA leave is exhausted. *Amsel v. Tex. Water Dev. Bd.*, 464 Fed. Appx. at 401-02. Here, TxDOT awarded the maximum available paid leave to Lara and held his position for more than five months before making a business decision to administratively separate. Lara has not established that, absent his "protected activity"/"request" for leave, the separation would not have occurred when it did. *Gumpert v. ABF Freight Sys., Inc.*, 293 S.W.3d

256, 262 (Tex. App.—Dallas 2009, pet. denied). There is no causal link for retaliation and Lara's retaliation claims should be dismissed.

PRAYER

For the reasons stated herein, TxDOT asks this Court to reverse the trial court's judgment and dismiss all claims for want of subject-matter jurisdiction with prejudice, in addition to any such further relief, general or specific, to which it may be justly entitled.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

RANDALL K. HILL
Assistant Attorney General
Chief, Transportation Division

/s/ Amy K. Owens
AMY KOVAR OWENS
State Bar No. 24053309
amy.owens@oag.texas.gov
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 463-2004
Facsimile: (512) 936-0888

ATTORNEYS FOR APPELLANT,
TEXAS DEPARTMENT OF
TRANSPORTATION

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the above computer-generated document contains a total of 9,166 words, not counting the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of issue presented, signature, certificate of compliance, certificate of service, and appendix, as counted by the program creating said document.

/s/ Amy K. Owens
Amy Kovar Owens
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on the 16th day of April, 2018, I served a copy of this ***Brief of Appellant Texas Department of Transportation*** on the following parties in accordance with the Texas Rules of Appellate Procedure:

Via Electronic Service and E-mail

Joel S. Shields
Scanes & Routh, LLP
7901 Fish Pond Road, Suite 200
P.O. Box 20965
shields@scanesrouth.com

Attorneys for Appellee Albert Lara, Jr.

/s/ Amy K. Owens
Amy Kovar Owens
Assistant Attorney General

APPENDIX A

NO. D-1GN-16-005836

ALBERT LARA, JR.	§	IN THE DISTRICT COURT
v.	§	TRAVIS COUNTY, TEXAS
TEXAS DEPARTMENT OF TRANSPORTATION	§	353RD JUDICIAL DISTRICT

ORDER DENYING MOTION TO DISMISS FOR WANT OF JURISDICTION AND MOTION FOR SUMMARY JUDGMENT

The Court has considered the Motion to Dismiss for Want of Jurisdiction and Motion for Summary Judgment filed by Defendant, Texas Department of Transportation. After considering the motion, the response, replies, and arguments at the summary-judgment hearing, the Motion to Dismiss for Want of Jurisdiction and Motion for Summary Judgment is DENIED.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendant's Motion to Dismiss for Want of Jurisdiction and Motion for Summary Judgment be and is hereby DENIED.

SIGNED this 21 day of February, 2018.

Dan Soifer
PRESIDING JUDGE